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No. 91-1516

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1991

ANNE G. STUART, ET AL.,
PETITIONERS,
v.
FRANCIS M. ROACHE, AS HE IS POLICE
COMMISSIONER OF
THE CITY OF BOSTON, ET AL.,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE FIRST CIRCUIT

BRIEF OF RESPONDENT MASSACHUSETTS ASSOCIATION OF MINORITY LAW ENFORCEMENT OFFICERS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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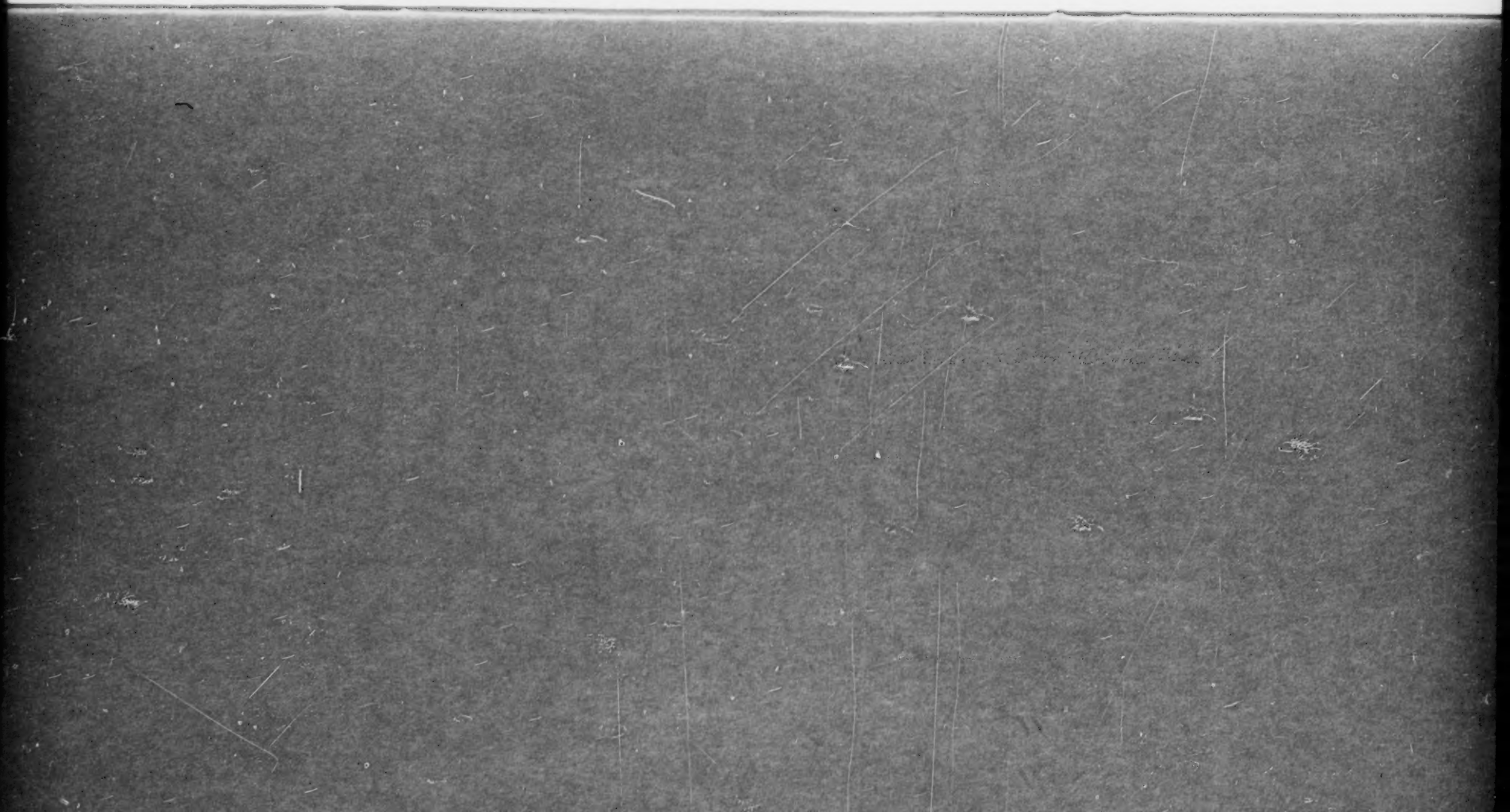

QUESTIONS PRESENTED

1. Whether certiorari should be granted to decide whether a disclaimer of liability contained in a consent decree precluded the lower courts from relying upon statistical and anecdotal evidence also contained in the decree in upholding the decree's affirmative action provisions, which since have expired.

2. Whether certiorari should be granted to decide whether the lower courts properly upheld a consent decree's affirmative action provisions, based upon findings that: (a) a historical racial imbalance between the eligible applicant pool and the public employer's work force provided a firm basis in evidence for believing that remedial action was needed; and (b) the affirmative action provisions, which since have expired, were narrowly tailored to serve their remedial purpose.

3. Whether as an alternative basis for affirming the judgment below, the affirmative action provisions formerly contained in the consent decree and authorized by Title VII should be scrutinized under a deferential standard which inquires only whether the objectives of the decree are within the powers of Congress and whether the limited use of racial criteria to achieve the decree's goals is permissible.

4. Whether, as an alternative basis for affirming the judgment below, the Thirteenth Amendment to the United States Constitution provided independent, constitutional authority for the consent decree's former use of affirmative action to remedy manifest racial imbalances in a public employer's workforce and to eliminate the adverse impact of the public employer's prior promotional practices.

LIST OF THE PARTIES

The petitioner failed to include in its list of the parties Respondent-Intervenor Massachusetts Association of Minority Law Enforcement Officers ("MAMLEO"). MAMLEO is a corporation organized under the laws of Massachusetts. It has no parent companies, subsidiaries or affiliates.

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CONSTITUTIONAL PROVISIONS

In addition to the constitutional provisions listed in the petition, this case involves the Thirteenth Amendment to the United States Constitution, which provides:

> Section 1. Neither slavery nor involuntary servitude, except as punishment for a crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.
>
> Section 2. Congress shall have the power to enforce this article by appropriate legislation.

STATEMENT OF THE CASE

MAMLEO incorporates by reference the statement of facts contained in the decision of the First Circuit of Appeals, reported at Stuart v. Roache, 951 F.2d 446 (1st Cir. 1991) and reprinted at pages 1 - 47 of the Appendix to the Petition.

Since the Court of Appeals decision was rendered, 16 additional promotions of black sergeants have been made by the respondent Boston Police Department. As a result, the affirmative action provisions of the decree have expired. Absent any further order of the District Court, therefore, the decree no longer provides for race conscious relief.

REASONS FOR DENYING WRIT

A. Petitioners Seek Certiorari to Review Their Unique Interpretation of the Particular Language of the Consent Decree's Disclaimer of Liability.

Reduced to essentials, petitioners seek review of what they contend is an erroneous interpretation of the particular language contained in the disclaimer of liability found in the consent decree at issue. No important legal questions of general applicability are raised. No conflict between decisions of other Circuit Courts of Appeals is implicated. No decision of this Court is contrary to the First Circuit's construction of the language employed in the disclaimer. Because the petition centers upon an analysis of the particular facts involved and upon the construction of the specific language of the decree, certiorari is not warranted. See generally United States v. Johnson, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts."). Graver Mfg. Co. v. Linde Co., 336 U.S. 271, 275 (1949) ("a

court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional show of error.").

In addition to its narrow and isolated focus, petitioners' argument based upon the disclaimer of liability contained in the decree is, on its merits, fatally flawed. The consent decree in this case, as is typical, contained a disclaimer of liability. Petitioner's Appendix ("App.") at 77-78. The salutory purpose of such disclaimers is well known. "The imposition of a requirement that public employers make findings that they have engaged in illegal discrimination before they engage in affirmative action programs would severely undermine public employers' incentives to meet voluntarily their civil rights obligations." Wygant v. Jackson Board of Education, 470 U.S. 267, 290 (1986) (O'Connor, J., concurring). See also United Steelworkers of America v. Weber, 443 U.S. 193, 209 (1979); id. at 210 (Blackmun, J., concurring) (upholding voluntary

affirmative action plan under Title VII despite employer's denial of wrongdoing); Firefighters v. Cleveland, 478 U.S. 501, 523-24 n.13 (1986) ("'A consent decree has several other advantages as a means of settling litigation. It is easier to obtain enforcement of a consent decree because it will be unnecessary to prove many facts that would otherwise have to be shown in order to establish the validity of an ordinary contract.'") (citations omitted); id. at 515 ("Congress intended voluntary compliance to be the preferred means of achieving the objectives of Title VII."); Johnson v. Transportation Agency, 480 U.S. 616, 652 (1987) (O'Connor, J., concurring) ("Thus, I concluded in Wygant that a contemporaneous finding of discrimination should not be required because it would discourage voluntary efforts to remedy apparent discrimination. A requirement that an employer actually prove that it had discriminated in the past would also unduly discourage voluntary efforts to remedy apparent discrimination."); United States v. Armour, 402 U.S. 673, 681-82 (1981) ("In a consent decree the parties waive their right

to litigate the issues involved in the case and thus save themselves the time, expense, and inevitable work of litigation.").

Thus, the disclaimer permitted the defendants to settle the case and undertake voluntary efforts to remedy the effects of their prior conduct without exposing themselves to indeterminable liability to third parties. That is not to say, however, that the disclaimer somehow invalidated all of the remaining, carefully negotiated terms of the decree that provided the basis for the settlement itself. Nor, for that matter, did the disclaimer rebut the allegations of the MAAAP plaintiffs' verified complaint or dissolve the admissions to particular facts established by the MAAAP defendants' answers (admissions wholly ignored by the petitioners' citation to the affirmative defenses alleged in the MAAAP defendants' answers. Petition at 13 & n.4).

In that regard, as the Court of Appeals found, the consent decree "recites figures that would appear to make out a

'prima facie' case of unlawful discrimination in the promotion of black officers by the Boston Police Department." Stuart, 951 F.2d at 450. Petitioners made no effort to rebut these statistics, despite their opportunity to do so. 951 F.2d at 453.

As the Court of Appeals noted, the decree also refers to a previously litigated case in which the same public employer was found to have discriminated against black applicants in its entry level hiring practices, a finding that has an obvious and direct effect on the promotional ranks at issue in this case. Id. See also Castro v. Beecher, 459 F.2d 725 (1st Cir. 1972). The petitioners' contention that the Court of Appeals went beyond the four corners of the decree to rely on the Castro case therefore is erroneous, as is their claim that the entry level discrimination found in Castro is unrelated to the discrimination in the promotional ranks addressed by the decree. Similarly, petitioners ignore that the MAAAP plaintiffs' verified complaint demonstrated the discriminatory effects of the defendants' prior

promotional tests on black officers who in fact took those exams. Stuart, 951 F.2d at 451.

Rather than attempting to rebut the facts and inferences naturally drawn from the decree and the MAAAP pleadings, the petitioners chose to rest their evidentiary case on the tortured proposition that the disclaimer of liability rendered the factual data contained in the decree meaningless surplusage and, further, forever precluded judicial inquiry into whether the decree's affirmative action provisions had a sufficient evidentiary basis. Apart from twisting the purpose of the disclaimer beyond recognition, the short answer to petitioners' argument is that, in the words of the Court of Appeals, "that is not what the disclaimer says." 951 F.2d at 453.

> The disclaimer simply precludes the decree's use an "admission" of liability, or as an "admission" of the facts and violations mentioned in the complaint. . . It does not say that it applies to facts agreed to in the decree itself. Nor does it say that the Department may not subsequently admit to the same facts for other purposes (which they have done in the case before us).

951 F.2d at 453 (emphasis in original).

At bottom, petitioners argue that the Court of Appeals somehow modified the decree by considering the facts recited in the decree as support for the relief entered therein. It is a perverse rule of construction, however, that postulates that enforcing explicit language found in a written instrument constitutes a modification of its terms. Firefighters v. Stotts, 467 U.S. 561 (1984), cited by petitioners, offers no support for such a position. Indeed, to the extent that Stotts requires the scope of a consent decree to be discerned within its four corners, id. at 574, the decision squarely supports the Court of Appeals' construction of the explicit language of the decree.

In sum, the petitioners' reliance upon the disclaimer in the decree renders the issue raised herein exceedingly narrow and of little, if any, significance to other litigants. For that reason, and because the construction given to the disclaimer by the District Court and the Court of Appeals clearly is correct, certiorari should be denied.

B. The Court of Appeals Properly Applied the Principles of this Court's Decision in Richmond v. J.A. Croson Co.

The Court of Appeals properly applied the principles set forth in this Court's decision in Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) and found that the decree's affirmative action provisions survived strict scrutiny.

An examination of the petition herein reveals that petitioners' true complaint is not that the Court of Appeals failed to apply the principles established in Croson but that, in their view, an erroneous decision was reached. A perceived error in the judgment reached below, however, is not sufficient by itself to warrant certiorari review. Ross v. Moffitt, 417 U.S. 600,

616-17 (1974). Moreover, the errors perceived by petitioners in the outcome below reflect their own misunderstanding of Croson and other decisions of this Court, and therefore do not warrant certiorari review.

Petitioners mistakenly assert that statistical evidence of a racial disparity in an employer's work force, even when properly marshalled, is insufficient to state a prime facie case of discrimination. Petition at 20. The Court recently, and repeatedly, has held to the contrary. See Wards Cove Packing Co. v. San Antonio, 490 U.S. 642, 650 (1989) ("statistical proof can alone make out a prima facie case"); Croson, 448 U.S. at 501 ("There is no doubt that '[w]here gross statistical disparities can be shown, they alone in a proper case may constitute prima facie proof of a pattern or practice of discrimination' under Title VII.") (emphasis added) (citation omitted); Wygant, 476 U.S. at 292 (O'Connor, J., concurring) ("For example, demonstrable evidence of a disparity between the percentage of qualified blacks on a school's teaching staff and the percentage of

qualified minorities in the relevant labor pool sufficient to support a prima facie Title VII pattern or practice claim by minority teachers would lend a compelling basis for a competent authority such as the school board to conclude that implementation of a voluntary affirmative action plan is appropriate to remedy apparent prior employment discrimination." See also Johnson, 480 U.S. 631-37; Hazelwood School District v. United States, 433 U.S. 299, 307-09 (1977).

Nor, contrary to the views advanced by the petitioners, is it necessary for a court to make findings of discrimination in order to justify an affirmative action plan. Petition at 21. Croson, 448 U.S. at 500 (test is whether a "'strong basis in evidence'" exists for conclusion that remedial action is necessary) (citations omitted); Wygant, 476 U.S. at 289 (O'Connor, J., concurring) ("[I] agree with the plurality that a contemporaneous or antecedent finding of past discrimination by a court or other competent body is not a constitutional prerequisite to a public employer's voluntary agreement to an

affirmative action plan."). The Court of Appeal's conclusion that findings of discrimination were not required was consistent with decisions of this Court and with a prior Court of Appeals decision involving a similar challenge to the consent decree at issue here and in which certiorari also was denied. See Massachusetts Association of Afro-American Police v. The Boston Police Department, 780 F.2d 5 (1st Cir. 1985), cert. denied, Burke v. Massachusetts Association of Afro-American Police, 478 U.S. 1020 (1986).

Petitioners also mischaracterize the Court of Appeals' decision as being based merely upon a finding that the statistical evidence "cas[ts] doubt on the fairness of the promotion process." Petition at 20, 22. To the contrary, the Court of Appeals found that the evidence -- unrebutted by petitioners -- seemed to make out a prima facie disparate impact case. Stuart, 951 F.2d at 450. In addition to such statistical evidence, the Court found a firm basis for remedial relief in the discriminatory results of prior promotional tests employed by the Police

Department and the prior findings of entry level discrimination by the Department. 951 F.2d at 450-52.

Moreover, the Court of Appeals was careful to ensure that the consent decree did not suffer from the defects identified in cases such as Croson and Wygant where the statistical evidence did not compare the racial composition of the job population to that of the relevant qualified applicant pool. 951 F.2d at 450-51. The Court painstakingly reviewed the statistics to determine that the decree "compares the number of black sergeants, not with the Boston population in general, but with those police officers with the minimal qualifications needed to become sergeants." 951 F.2d at 451.

In sum, the Court of Appeals strictly adhered to the holding in Croson in finding that a firm basis in evidence existed for the conclusion that the affirmative action provisions of the decree were necessary. 951 F.2d at 449-452.

The Court of Appeals also adhered to the teachings of Croson in concluding that the decree was narrowly tailored to

accomplish its goals. As noted above, after the Court of Appeals' decision was rendered and, indeed, after the petition was filed, the affirmative action provisions of the decree expired as a result of promotions made by the Boston Police Department in April of 1992. The decree thus is anything but "self-perpetuat[ing] and self-modifying" as alleged by the petitioners. Petition at 23.

Several other features of the decree also justified the Court of Appeals' conclusion that it was sufficiently narrowly tailored. For example, the decree never provided for mandatory quotas. To the contrary, the Police Department's obligation was "to make a good faith effort" to reach its goals. The goals were set in anticipation of having a sufficient number of Black officers eligible to be promoted as a result of validated tests. Only those Black officers who passed a validated exam were eligible for promotion. No Black officer received an absolute entitlement to promotion under the decree. No white officer automatically was excluded from promotion as a result of its

terms. App. 95-96. The decree thus did not unsettle any legitimate, firmly rooted expectation on the part of white officers. Stuart, 951 F.2d at 454. See generally Johnson, 480 U.S. at 638.

No officer ever was discharged, demoted, or suffered any loss of salary or benefits as a result of the decree. Weber, 443 at 208. Compare Wygant, 476 U.S. at 282-83. ("Denial of a future employment opportunity is not as intrusive as loss of any existing job.") The goals and timetables were designed to eliminate a manifest racial imbalance, not to maintain a racially balanced work force. Weber, 443 U.S. at 208. Johnson, 480 U.S. at 616. The updating of the goals and timetables in 1990 to reflect the current racial composition of the Department's work force further prevented the maintenance of any rigid quota system. Stuart, 951 F.2d at 454-55.

As the Court of Appeals found, the petitioners' further claim that the Police Department did not consider alternatives to affirmative action also is misplaced. The decree described the

inadequacies of previous efforts to reform the promotional system, expressly took into account the "need for prompt elimination of adverse impact or disparate treatment," and concluded that affirmative measures to promote more Blacks to supervisory positions were needed "in order to prevent the disparity between the percentage of Black supervisors and the percentage of Blacks eligible for promotion to supervisor from growing, and in order to reduce that disparity...." App. at 93-96.

In sum, the Court of Appeals properly adhered to Croson's strict scrutiny standard in reviewing the affirmative action components of the decree. Moreover, even if certiorari properly could be granted to correct erroneous conclusions reached in applying proper standards of review to the facts of a particular case, there was no error here and certiorari therefore should be denied.

C. Alternative Grounds Exist on which the Court of Appeals' Judgment Upholding the Consent Decree Can Be Affirmed.

Although not relied upon by the Court of Appeals, there exist alternative grounds asserted below by MAMLEO on which the judgment of the Court of Appeals can be affirmed. See generally Massachusetts Mutual Life Ins. Co. v. Ludwig, 426 U.S. 479, 481 (1976) (court can find another ground for affirmance not relied upon by lower court).

1. The Consent Decree Is a Valid Exercise of Power Granted Pursuant to Title VII and Section 5 of the Fourteenth Amendment.

Congress possesses broad remedial powers under 5 of the Fourteenth Amendment to eradicate the effects of prior discrimination, Fullilove v. Klutznik, 448 U.S. 483 (1980); Croson, 488 U.S. at 487-89. In Fullilove, for example, this Court upheld a minority set aside program adopted by Congress and, in so doing, employed a deferential standard of review which inquired only whether the objectives of the legislation were within the power of Congress and whether the limited use

of racial and ethnic criterion was a permissible means to achieve Congress' objectives. 448 U.S. at 473. See also Croson, 488 U.S. at 487.

A similarly deferential standard of review should be applied in this case, where the power of a public employer and the District Court to implement the Congressional objectives of Title VII through the entry of a consent decree is at issue. See generally Sheet Metal Workers v. EEOC, 478 U.S. 421, 428 (1986) ("In order to foster equal employment opportunities, Congress gave the lower courts broad power under 706(g) to fashion 'the most complete relief possible' to remedy past discrimination.") (citation omitted). There is no question that Title VII permits voluntary affirmative action efforts undertaken without prior findings or admissions of discrimination in order to eliminate traditionally segregated job categories and delegates to the courts the power to enter such relief in the form of a consent decree. Weber, 443 U.S. at 197, 209; Hazelwood, 433 U.S. at 299; Firefighters, 478 U.S. 501. Congressional

authorization of such efforts through Title VII arises out of Congress' broad remedial powers under 5 of the Fourteenth Amendment. Just as eradicating the effects of prior discrimination clearly falls within the powers of Congress, Fullilove, 448 U.S. at 473, so too, the limited use of racial criterion contained in the decree is a permissible means for the Court to implement the objectives of Congress. Id. Should certiorari be granted, no more need be shown to uphold the validity of the consent decree under the Fullilove standard.

2. Race-Conscious Remedies Are Valid Under the Thirteenth Amendment.

"Wholly aside from the fourteenth amendment, the thirteenth amendment is an affirmative grant of power to eliminate slavery along with its badges and incidents and to establish universal civil freedom." Williams v. City of New Orleans, 729 F.2d 1554, 1557 (5th Cir. 1984) (Wisdom, J., concurring in part, dissenting in part). Thus, when a present discriminatory effect upon Blacks as a class is linked to a

discriminatory practice against Blacks as a race under the slavery system, the present effect may be eradicated under the auspices of the Thirteenth Amendment. Id. See generally The Civil Rights Cases, 109 U.S. 3, 35 (1883) (Harlan, J., dissenting).

In Jones v. Alfred Mayer Co., 392 U.S. 409 (1968), this Court affirmed the power of Congress, based on the Thirteenth Amendment, to prohibit all racial discrimination in the sale and rental of property. Id. at 437-44. The Court held that "Congress has the power under the Thirteenth Amendment rationally to determine what are the badges and incidents of slavery, and the authority to translate that determination into effective legislation." Id. at 440. Under the Jones v. Mayer rationale, current forms of racial discrimination and its effects are badges of slavery that may be proscribed under the Thirteenth Amendment if they are historically linked with slavery or involuntary servitude. In granting Congress the power to carry out its mandate, the Thirteenth Amendment thus grants the

power to eliminate practices that continue to burden Blacks with badges of inferiority.

> Congress is free, within the broad limits of reason, to recognize whatever rights it wishes, define the infringement of those rights as a form of domination and thus an aspect of slavery, and proscribe such infringement as a violation of the thirteenth amendment.

L. Tribe, American Constitutional Law, 5-13 at 259 (1978).

Because the Thirteenth Amendment seeks to attain "universal civil freedom for Blacks as a race," The Civil Rights Cases, 109 U.S. at 20, remedial action must address the needs of Blacks as a race, and not be confined to identifiable victims. See generally Williams, 729 F.2d at 1580 (Wisdom, J., concurring in part, dissenting in part). The promotional goals established by the consent decree are an attempt to eliminate the badges and incidents of slavery reflected in the Police Department's past hiring practices and condemned by the Castro v. Beecher decision. The Thirteenth Amendment authorized Congress to delegate to the courts the power to enter such

affirmative action in the form of a consent decree regardless of whether prior findings or admissions of discrimination are made. The Thirteenth Amendment therefore provides an alternative basis to affirm the judgment of the Court of Appeals.

CONCLUSION

For each and all of the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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DATED: April 27, 1992